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In Re Applications of:)	MM DOCKET No.: 97-78
AMERICAN FAMILY ASSOCIATION)	
Channel 201C)	File No.: BPED-940214MA
Marksville, Louisiana)	
EDUCATIONAL RADIO FOUNDATION)	
OF EAST TEXAS, INC.)	File No.: BPED-940804MA
Channel 201)	
Jena, Louisiana)	

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OF EAST TEXAS, INC.)
Channel 201)
Jena, Louisiana)

Suite 201, Courtroom 2
FCC Building
2000 L Street, N.W.
Washington, D.C.

Thursday,
March 27, 1997

The parties met, pursuant to the notice of the
Judge, at 9:00 a.m.

BEFORE: HON. EDWARD LUTON
Administrative Law Judge

APPEARANCES:

On behalf of the Applicant/American Family:

BRUCE GREEN, ESQ.
PATRICK VAUGHN, ESQ.
THOMAS SCOTT, ESQ.
MARTHA SCHRADER, ESQ.
American Family Association
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(202) 628-4888

APPEARANCES (continued):

On behalf of the Applicant/Educational Radio:

BRADFORD D. CAREY, ESQ.
Hardy and Carey, L.L.P.
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(504) 830-4644

On behalf of the Commission:

JAMES SHOOK, ESQ.
Federal Communications Commission
Mass Media Bureau
Enforcement Division
2025 M Street, N.W.
Suite 8210
Washington, D.C. 20554
(202) 418-1430

1 P R O C E E D I N G S

2 JUDGE LUTON: My name is Edward Luton. This is a
3 prehearing conference in the case of American Family
4 Association and Educational Radio Foundation of East Texas,
5 Incorporated, and applications or contracts for applications
6 for a noncommercial educational FM station.

7 In my experience, not many of these kinds of cases
8 go to hearing. This one may. It's not unheard of.

9 MR. GREEN: Excuse me, Your Honor. May I close
10 the door?

11 JUDGE LUTON: Please do. It's not unheard of that
12 this kind of case will go to hearing, but if this one should
13 go to hearing, it would be new in my experience, quite
14 frankly.

15 May I have the appearances, please, of the
16 parties?

17 MR. GREEN: My name is Bruce Green, representing
18 American Family Association. And to my right is Pat Vaughn.
19 I'm general counsel; Pat is the assistant general counsel.
20 And then to my far right is Tom Scott, with the engineering
21 department, and Marsha Schrader, to his left.

22 JUDGE LUTON: All right. Representing who?

23 MR. GREEN: American Family Association.

24 JUDGE LUTON: American Family. All right. Thank
25 you. Yes, sir.

1 MR. CAREY: Good morning, Your Honor.

2 JUDGE LUTON: Good morning.

3 MR. CAREY: Bradford Carey, of the firm Hardy and
4 Carey, on behalf of Educational Radio Foundation of East
5 Texas, Inc.

6 JUDGE LUTON: All right. Thank you. Now, I
7 received a written appearance from you, but I did not get
8 one --

9 MR. GREEN: I apologize, Your Honor. We did, ah,
10 we did indeed, file them. I have here, if I might approach?

11 JUDGE LUTON: That's fine. Sure.

12 MR. SHOOK: Okay, Your Honor, lest we forget, I'm
13 James Shook --

14 JUDGE LUTON: I'm not about to forget you,
15 Mr. Shook.

16 MR. GREEN: I apologize, Your Honor. I thought we
17 did send that.

18 JUDGE LUTON: That's all right. Maybe it was
19 filed and I simply didn't get it. But, thank you, anyway.

20 MR. GREEN: Thank you.

21 JUDGE LUTON: All right, Mr. Shook, would you?

22 MR. SHOOK: Your Honor, if I might note, I will
23 acknowledge that I did receive a notice of appearance for
24 him.

25 JUDGE LUTON: I have no difficulty with it. I

1 didn't mention that in disbelief. I'm just making note of
2 the fact that I haven't received it.

3 Mr. Shook, I was continuing to talk as you were
4 making your appearance. Would you state it again, please?

5 MR. SHOOK: James Shook, on behalf of the Chief,
6 Mass Media Bureau.

7 JUDGE LUTON: All right. Now, at the time that
8 the designation order was issued, apparently the Commission
9 was of the view that no attempt had been made by the
10 applicant for a comp time share arrangement in this case.
11 And it went ahead, as I read this, "I wish to encourage the
12 parties to do so."

13 Have there been any discussions about a time share
14 arrangement since the designation order issued?

15 MR. CAREY: Your Honor, Bradford Carey, if I
16 might? No, there have not been any discussions about a time
17 share. There have been discussions, both before the
18 designation order and some since as to how we might resolve
19 this proceeding.

20 The gentleman from American Family Association
21 this morning presented me with a -- what I take to be a
22 revision of a previous proposal of theirs that may be
23 acceptable. And we were laying it out for Mr. Shook a few
24 moments ago and discussing some of the nuances of it.

25 JUDGE LUTON: All right. Well, you've just not

1 had enough time yet, I suppose, to come to any conclusion
2 about that, but it's nice to know that kind of discussions
3 are underway.

4 MR. CAREY: If I might also, Your Honor, my
5 reading of the rules had it that yesterday was the deadline
6 for motions to enlarge, and we did file one at the close of
7 business yesterday. And this morning, I've given counsel a
8 copy of it, because I'm sure their mail copy service hasn't
9 reached them. It couldn't have possibly reached them.

10 In view of the settlement proposal that they
11 presented, in fact, before I gave -- before they were aware
12 of this, in a motion I filed yesterday, I would ask for
13 leave to suspend their reply date for a couple of weeks so
14 that we could further explore the settlement, without them
15 also having to litigate at the same time.

16 And, further, I would contemplate requesting leave
17 to withdraw the motion if we should settle.

18 JUDGE LUTON: Why don't you just withdraw it and
19 refile it if you need to?

20 MR. CAREY: If Your Honor will give me leave,
21 without the 30 day deadline, I would be happy to do that.

22 JUDGE LUTON: Yes, why don't you do that.

23 MR. CAREY: Okay, then. Would you like an oral
24 motion now?

25 JUDGE LUTON: It will be off the table. Yes, I

1 will grant that motion -- consider that it's been made and
2 granted right now.

3 MR. CAREY: Thank you, Your Honor.

4 MR. SHOOK: Thank you, Your Honor.

5 JUDGE LUTON: I don't want anything to get in the
6 way of ongoing negotiations, certainly.

7 Section 307(b), Comparison of Community Needs,
8 will be the determinant in this case, as I read this thing.
9 And if neither community is deemed worthy, so to speak,
10 we'll go back to the holding pattern. That is to say, we'll
11 wait for the Commission to -- wait some more for the
12 Commission to produce comparative criteria.

13 It's already been a long time. It might be yet a
14 longer time. The parties ought to keep that in mind as they
15 carry on their negotiations.

16 It may be a little early to even ask the question,
17 but I'll ask it anyway, Mr. Carey. Are you hopeful about
18 prospects for a settlement?

19 MR. CAREY: Based on what was presented to me,
20 Your Honor -- I mean, Mr. Scott's a well-known engineer and
21 I'm taking what he's put in front of me. It would be
22 difficult for me not to try to put together -- not to try to
23 conclude the settlement.

24 JUDGE LUTON: All right. In case the parties
25 aren't able to work out a settlement, we'll need to schedule

1 some dates. Well, we'll need to set some dates, in any
2 event, whether a settlement is worked out or not.

3 The assignment order has already set the hearing
4 to begin on August 13 of this year. We'll need a couple of
5 dates in addition to that. A date for the naming of
6 witnesses who will be asked to testify. A week ought to be
7 enough time to do that, so I'll set August 6.

8 MR. CAREY: Your Honor?

9 JUDGE LUTON: Yes, sir?

10 MR. CAREY: In view of the fact that a lot of
11 people might be taking vacation, would you mind if we pushed
12 that back a week yet earlier, just for the -- so we could
13 let witnesses --

14 JUDGE LUTON: Sure.

15 MR. CAREY: -- know a little bit earlier?

16 JUDGE LUTON: That's right, August is a favorite
17 vacation time. I'm sure that will be no problem. We'll
18 move it from the sixth to the 30th of July.

19 MR. CAREY: Thank you, Your Honor.

20 JUDGE LUTON: All right. That leaves a lot of
21 time for the preparation of exhibits. And I understand that
22 in a case such as this, that's often necessary, because if
23 there do have to be exhibits, they're kind of cumbersome and
24 expensive to put together. So, July 30 for witnesses. How
25 about July 9? That's three weeks before witnesses are to be

1 called. I'll set July 9 for the exchange of exhibits.

2 All right, so, we've got the hearing August 13.

3 The witnesses to be called July 30 -- or to be named
4 July 30. And exhibits to be exchanged on July 9.

5 Are those dates acceptable down here?

6 MR. GREEN: It is. Bruce Green, for American
7 Family, Your Honor. It is acceptable to us.

8 JUDGE LUTON: All right. Thank you.

9 MR. CAREY: Yes, Your Honor.

10 JUDGE LUTON: All right, fine.

11 MR. SHOOK: Your Honor?

12 JUDGE LUTON: Yes?

13 MR. SHOOK: In these cases, there is normally a
14 joint engineering exhibit. Would it be possible to have the
15 parties produce a joint engineering exhibit approximately
16 two weeks in advance of the final exchange, so that in the
17 event that there are any problems with that, they could be
18 cleaned up before the final exchange? That's something that
19 I believe has been done in cases of this nature most of the
20 time.

21 JUDGE LUTON: You're right. There's a preliminary
22 exchange of exhibits. Now, how would that work in this
23 case? You say, "would have"?

24 MR. SHOOK: I would like to give our engineers in
25 the Audio Services Division at least two weeks to get their

1 thoughts together on any such exhibit. And then we could,
2 you know, have time to tell the parties what, if any,
3 problems we have so that they could be cleared up before the
4 final exchange.

5 JUDGE LUTON: Right.

6 MR. SHOOK: So, perhaps, a three-week lag between
7 the time of final exchange and the preliminary exchange for
8 us.

9 JUDGE LUTON: All right. That makes good sense.
10 It just may be that the parties will be able to agree on a
11 joint exhibit, which would save everybody a lot of money, I
12 suppose.

13 MR. CAREY: Your Honor?

14 JUDGE LUTON: Yes, sir?

15 MR. CAREY: I have no problem with a preliminary
16 exchange. However, since we have only two parties, I'm
17 wondering -- I mean, if the two of us can agree on a joint
18 engineer, that would be wonderful, and, hopefully, handle
19 it.

20 However, if -- if -- if forced to have a joint
21 engineering exhibit and each of us were -- each of us, since
22 that would be the case, absent anything else -- each of us
23 will feel compelled to bring in our own engineer to analyze,
24 in the light most favorable to us, that joint engineering.

25 And I'm afraid that, possibly, by having a joint

1 engineer, we may be adding engineering testimony of a third
2 engineer, rather than just having two sets of engineering
3 (sic). And so, I'd like not to have to have a joint
4 engineering exhibit. If we can agree on one, I'd like that
5 flexibility.

6 MR. GREEN: Your Honor, with respect to American
7 Family Association, we would prefer, if we could, to have a
8 joint engineering agreement.

9 JUDGE LUTON: You say you would prefer not to?

10 MR. GREEN: No, we would prefer to, if we could
11 come those kind --

12 MR. SHOOK: I think we can.

13 JUDGE LUTON: And your concern is that -- well,
14 what is your concern, now? That it may not be necessary or
15 that, when it comes time for the hearing, you may have
16 another engineer in the mix giving testimony that's going to
17 complicate it?

18 MR. GREEN: Well, since --

19 JUDGE LUTON: I didn't follow you.

20 MR. CAREY: -- okay, let me see if I can perhaps
21 be a little more succinct than I was. Since this is, at
22 this point, a 307(b) only case, if -- if we can agree on an
23 engineer and agree on their engineering, wonderful. And I
24 hope that will work.

25 If not, each of us, besides having the joint

1 engineer, which each of us is paying half of the cost of, we
2 will each be obliged to bring in our own engineer to
3 contradict the joint engineering.

4 Ah, and now we have three engineers testifying
5 instead of two. Hopefully, that won't occur, but since this
6 is only a 307(b) case, I mean, that is the crux of the case
7 and, obviously, as counsel, we will have to watch that very
8 carefully.

9 JUDGE LUTON: So, you would like not to be
10 required to --

11 MR. CAREY: That's correct. To have the option,
12 but not a requirement.

13 MR. SHOOK: Your Honor, once again, perhaps His
14 Honor could clarify this. It's my understanding that the
15 rules require such a -- a joint engineering statement.
16 Since it is a 307(b) hearing, it is a little unclear to me,
17 with respect to what kind of testimony we would need from
18 engineers, other than that joint, ah -- ah, statement, since
19 we're going to be dealing with a comparison of the
20 respective communities' needs for the proposed ser- -- new
21 service. So, I'm still not quite clear on what we would
22 need additional testimony for.

23 JUDGE LUTON: Okay, well, I'm not going to try to
24 tell you. I'll ask you to speak with Bureau counsel after
25 this is over. They can give you some insight into that

1 better than I can, quite frankly. But you're going to be
2 concerned with service areas, for sure. And that's where
3 your engineers are going to step up to the plate.

4 Now, let's see. Mr. Carey would like to have the
5 option, or at least have the way open to participate in a
6 preliminary joint exhibit, but would like not to be required
7 to participate in one.

8 MR. CAREY: Right. I have no problem with early
9 exchange of the engineering exhibits.

10 JUDGE LUTON: Yes. It doesn't matter to me, quite
11 frankly.

12 How does the Bureau feel? The Bureau raised the
13 point. It is correct that, in these cases, it is usually so
14 that there's a preliminary exhibit and -- I've never seen it
15 be controversial before. You would like for the Bureau --

16 MR. SHOOK: Neither have I, Your Honor. I mean,
17 it's certainly customary to have a joint engineering exhibit
18 prepared. And in my experience, however limited that might
19 be, we have yet to encounter a situation like this, where
20 one of the parties so objected to the joint engineering
21 exhibit that it felt compelled to produce an exhibit of its
22 own.

23 Because, usually in these matters, you know, the
24 mathematics are what they are. And if there is to be a
25 difference, it's likely to be very slight and not worth the

1 trouble and expense of an additional exhibit plus the
2 possible testimony of two engineers squabbling over which
3 exhibit is the more accurate.

4 So, we would prefer if Your Honor would order the
5 preparation and submission of a joint engineering exhibit.
6 And, in the event one of the parties feels, you know, so put
7 upon by that exhibit that it feels --

8 JUDGE LUTON: He'll go off and do his own.

9 MR. SHOOK: -- he can off and do his own.

10 JUDGE LUTON: That's what I'm going to do. I'm
11 going to require that there be a preliminary exchange to an
12 exhibit. It will bind nobody. It will be a preliminary
13 exhibit. Both parties, if they can't agree on it, then
14 we'll receive their respective exhibits individually.

15 July 9 is the date for the exchange of the final
16 engineering exhibits. Preliminary -- we'll go back, oh,
17 say, another three weeks?

18 MR. SHOOK: Yes, Your Honor.

19 JUDGE LUTON: That will be Wednesday, the second,
20 twenty-fifth, June the 18th.

21 MR. GREEN: Your Honor, if I might ask for
22 clarification? That's the exchange with the Commission --
23 it's not the parties only -- but provision on that date for
24 the Commission.

25 MR. SHOOK: Well, as a technical matter, the

1 Bureau is a party in this proceeding, so what you're doing
2 -- the two applicant parties -- are preparing and submitting
3 to us a joint engineering exhibit which we can then review
4 and get back to you and let you know if we have any problems
5 with it.

6 MR. GREEN: Okay. And that submission, then, to
7 the Bureau would be on June 18.

8 MR. SHOOK: Correct.

9 JUDGE LUTON: I think the idea of a joint
10 submission is to try to save everybody a lot of -- some
11 money and some time and some grief, quite frankly. I don't
12 see that it's really anything to -- to dispute, to tell you
13 the truth.

14 All right, scheduled hearing, August 13.
15 Witnesses, July 30. Exhibits, final exhibits, July 9.
16 Engineering exhibits, preliminary, June 18, 1997.

17 Is there anything else that we need? Anything
18 else anybody else wants to raise?

19 MR. CAREY: Nothing from me, Your Honor.

20 JUDGE LUTON: All right.

21 MR. GREEN: Nothing from us, Your Honor.

22 JUDGE LUTON: All right. Thank you very much.

23 And we'll be in recess.

24 (Whereupon, at 9:20 a.m., the proceeding was
25 concluded.)

REPORTER'S CERTIFICATE

FCC DOCKET NO.: MM-97-78
CASE TITLE: Markville, LA (AFA)
HEARING DATE: March 27, 1997
LOCATION: Washington, D. C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Federal Communications Commission.

Date:

3/27/97

Vercountess Grady
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I hereby certify that the transcript of the proceedings and evidence in the above referenced case that was held before the Federal Communications Commission was proofread on the date specified below.

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